

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

AG. G. a minor, by and through his guardian ad litem, JESSICA AQUINO; AR. G., a minor, by and through his guardian ad litem, JESSICA AQUINO; KARLA GONSALEZ, individually; and AUGUSTIN GONZALES JR., individually;

Plaintiffs,

vs.

CITY OF HAYWARD, a municipal corporation; MARK KOLLER, individually; PHILLIP WOOLEY, individually; MICHAEL CLARK, individually; TASHA DECOSTA, individually; and DOES 1-100, inclusive,

Defendants.

Case No. 4:19-cv-00697 DMR

**DECLARATION OF BENJAMIN
NISENBAUM IN SUPPORT OF
PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT**

**Date: July 9, 2020
Time: 1:00 p.m.
Courtroom: 4**

Hon. Donna M. Ryu

EXHIBIT N

DEPOSITION OF LIEUTENANT MARK ORMSBY

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

--oOo--

AG.G. a minor, by and through)
his guardian ad litem, JESSICA)
AQUINO; AR.G., a minor, by and)
through his guardian ad litem,)
JESSICA AQUINO; KARLA GONSALEZ)
individually; and AUGUSTIN)
GONSALEZ, JR., individually,)

Plaintiffs,)

vs.)

CASE NO.: 4:19-cv-00697 DMR

CITY OF HAYWARD, a municipal)
corporation; MARK KOLLER,)
individually; PHILLIP WOOLEY,)
individually; MICHAEL CLARK,)
individually; TASHA DECOSTA,)
individually; and DOES 1-100,)
inclusive,)

Defendants.)

CERTIFIED COPY

DEPOSITION OF LIEUTENANT MARK ORMSBY - PMK

MONDAY, JANUARY 27, 2020

REPORTED BY: KELLY L. MCKISSACK, CSR #13430

DEPOSITION OF LIEUTENANT MARK ORMSBY

1 Pursuant to Notice of Taking Deposition, and
2 on Monday, January 27, 2020, commencing at the hour of
3 10:01 a.m., thereof, at 7677 Oakport Street, Suite 1120,
4 Oakland, California 94621, before me, KELLY MCKISSACK,
5 CSR No. 13430, a Certified Shorthand Reporter and
6 Deposition Officer of the State of California, there
7 personally appeared:

8
9 MARK ORMSBY,

10
11 called as a witness by the Plaintiffs, who having been
12 duly sworn by me, to tell the truth, the whole truth and
13 nothing but the truth, testified as hereinafter set
14 forth:

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DEPOSITION OF LIEUTENANT MARK ORMSBY

1 MARK ORMSBY,
2 having been first duly sworn, testified as follows:
3 THE WITNESS: (TO OATH) I do.
4

5 EXAMINATION

6 BY MR. NISENBAUM: Q. Can you please state and spell
7 your name.

8 A. Yes. Mark Ormsby, M-A-R-K, O-R-M-S-B-Y.

9 Q. And what is your current occupation?

10 A. Police officer.

11 Q. It's my understanding that you're a
12 lieutenant; is that correct?

13 A. Correct.

14 Q. Okay. And I'm going to -- well, I won't
15 attach it. I'll just read it. You've been produced by
16 the defense in connection with Plaintiffs' deposition
17 notice as a, "person most knowledgeable pursuant to FRCP
18 30(b)(6) regarding all policies, procedures and training
19 of Hayward Police Department officers in using
20 deescalations," misspelling there with the S, "tactics
21 against subjects who they are responding to."

22 Is that your understanding?

23 A. Yes.

24 Q. Okay. And could you briefly -- and I think
25 your -- put you down twice. In any event, sorry about

DEPOSITION OF LIEUTENANT MARK ORMSBY

1 correct?

2 A. Correct.

3 Q. All right. So on the second page, Bates stamp
4 2015, it says what this training covers. Skills you
5 already use on a daily basis. Pulls those skills
6 together. Applies them to non-firearms critical
7 incidents. Emphasis on teamwork. Focus on persons in
8 crisis, in quotations, suicide by cop, close quote,
9 situations, correct?

10 A. Correct.

11 Q. Okay. So these are -- the training from ICAT
12 applies to suicide by cop situations in non-firearm
13 critical incidents?

14 A. Correct.

15 Q. What does that term mean, non-firearm critical
16 incidents?

17 A. A subject that does not have a firearm.

18 Q. Okay. So the subject might have a weapon like
19 a knife and it would apply, correct?

20 A. Circumstantially.

21 Q. Right. Okay. And to be clear, what the
22 subject is about -- I'm sorry. What the -- what the
23 deescalation training is about is about increasing an
24 officer's options, correct?

25 A. Correct.

DEPOSITION OF LIEUTENANT MARK ORMSBY

1 Q. Okay. In other words, not saying you just
2 walk away. It's not saying, well, we're going to put
3 you in an unwinnable situation. And it's not saying you
4 can't use reasonable force when it's appropriate?

5 A. Correct.

6 Q. But if you apply the tactics of the training,
7 hopefully you'll be able to bring the situation down to
8 where you use less force or no force, correct?

9 A. Potentially.

10 Q. You mean, hopefully, yes?

11 A. Hopefully.

12 Q. Yes. But you have to apply the tactics in
13 order to do that, correct?

14 A. Correct.

15 Q. Okay. Now, skipping to Bates 18, the last two
16 digits. It says four key areas. Patrol officer
17 response, non-firearms incident. So, again, that states
18 that this applies where the subject is not armed with a
19 firearm, correct?

20 A. Correct.

21 Q. And, if you know, is that because with a
22 firearm a person can become almost instantaneously
23 lethal?

24 A. Correct.

25 Q. So it applies where there's time and

DEPOSITION OF LIEUTENANT MARK ORMSBY

1 opportunity to apply the tactics?

2 A. Correct.

3 Q. And the purpose, again, this is Bates 19, is
4 to gain voluntary compliance when possible?

5 A. Correct.

6 Q. Turning to Page 20 it says four key areas.
7 And the last one of these which is in bold, "Officer
8 safety and wellness: Physical, emotional, legal."
9 What's discussed in that area?

10 A. When we talk about use of force instances,
11 whether it's involved in a shooting or major use of
12 force and the potential for being sued, we talk about
13 the stresses of the processes and things like that. And
14 physically it's when you get into a fight there's a
15 potential for you to be injured also in the middle of
16 using a use of force.

17 Q. I assume part of the ICAT training includes
18 techniques for how -- for an officer to try to keep
19 their own cool?

20 A. Correct.

21 Q. And to try not to overreact?

22 A. Correct.

23 Q. As part of that is there discussion about
24 using reasonably available less lethal alternatives in
25 the ICAT training?

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1 tactics are trained on at Hayward Police Department?

2 A. I would say one of. Because we do have a
3 deescalation course in CIT that the department has put
4 on a few times. And I believe we have someone come in
5 and talk about that today.

6 Q. Okay. That would be the other deescalation
7 PMK?

8 A. Yes.

9 Q. Okay. And do you know how this training
10 differs from that training?

11 A. I do not.

12 Q. Okay. You've been trained in both?

13 A. I have.

14 Q. Okay. So step one, this is Bates 30, collect
15 information. How do you train officers to collect
16 information?

17 A. A lot of time the information we talk about
18 here is from dispatch. And us asking questions if there
19 are some things that we'd like to have more information
20 on that would allow us more time if -- if it was
21 available.

22 Q. Sure. Are officers trained that part of
23 collecting information is to once they arrive on scene
24 use their own senses to collect information?

25 A. Yes.

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1 Q. In other words, what you see, what you
2 personally see, what you hear, might be different than
3 the information you get from dispatch, correct?

4 A. Correct.

5 Q. And so officers should be -- well, strike
6 that.

7 Are officers trained that while they ought to
8 keep the information from dispatch in mind, if what they
9 see is different than dispatch, they don't disregard
10 what they see?

11 A. Correct.

12 Q. Okay. Are you familiar with the term
13 swatting?

14 A. Yes.

15 Q. What is swatting?

16 A. Where an individual would call in to dispatch
17 with a pretty serious critical incident in hopes of
18 getting all of the police resources there and usually
19 finding that it's a hoax.

20 Q. Meaning that someone will call in a false
21 threat on another person forcing a massive police
22 response, a SWAT-type response, to that person with
23 false information, correct?

24 A. I don't think I necessarily see it the same
25 way you do. I think you're -- if I'm getting you

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1 correctly, you're saying that someone, like, I have a
2 problem with Mike. And so I call on this information on
3 Mike to bring all the resources there just to make his
4 life miserable?

5 Q. Yeah.

6 A. I don't see swatting as that. And that hasn't
7 been my experience of swatting. My experience of
8 swatting has been more of a rogue person just picking an
9 address and calling as more of a practical joke than it
10 is to set somebody up.

11 Q. I got that.

12 A. Okay.

13 Q. But still calling with false information to
14 cause a massive police response to the person; is that
15 correct?

16 A. Correct.

17 Q. Okay. What steps -- I assume that officers at
18 Hayward are trained to consider those possibilities as
19 well, that the information provided may not be accurate
20 by the caller?

21 A. I would say we've probably done lineup
22 training, not formal CPT training. But because we've
23 had some instances over the last year where we've had
24 some swatting instances. So I would say there's been
25 lineup training, not formal training.

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1 Q. When did that training first begin?

2 A. I guess it would have been based on each
3 individual watch commander to decide when and how that
4 training was conducted, if everybody even covered it.
5 So it wasn't a mandate that came out that says, hey, you
6 need to have training on swatting. Because we had
7 several calls. And it's in the watch commanders log.

8 And I would say most watch commanders are
9 going to read that and say, hey, I probably should talk
10 to my officers about this so they have an understanding
11 what's going to happen.

12 Q. Do you have an understanding of whether there
13 was any lineup training conducted prior to this
14 incident?

15 A. I do not.

16 Q. Okay. And you understand by this incident I'm
17 referring to the Augustin Gonzalez incident?

18 A. Correct.

19 MR. VIGILIA: Just for clarification, lineup
20 training regarding swatting?

21 MR. NISENBAUM: Yes.

22 Q. But even without that training, I assume that
23 officers are, to your knowledge, are trained
24 particularly as part of the critical decision-making
25 model to try to confirm the information received from

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1 information that would have shown both that there was a
2 threat inside the house, but not a threat outside the
3 house, correct?

4 A. Correct.

5 Q. And that because of that they would be able to
6 do like a surrounding call-out type thing?

7 A. Correct.

8 Q. Okay. Something that would slow the situation
9 down and not put anyone in harm's way unless the subject
10 essentially came barreling out of the house?

11 A. Right. Which is one of the reasons we like to
12 show this video is because the subject is isolated. And
13 when you go back to Exhibit B, the immediacy and
14 severity of the threat to the officers and others, this
15 is in that situation where it could have slowed down.

16 Q. I see. And so the next slide, number 34,
17 "Assess" -- "Step 2: Assess Situation, Threats and Risk.
18 Ask yourself...Do I need to take immediate action?"

19 And, again, that depends on what immediate
20 threat the subject is, correct?

21 A. Correct.

22 Q. Okay. And are officers trained that as part
23 of the deescalation that if they do at some point put
24 themselves in harm's way by being too close to the
25 individual, that if they can step back from the

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1 individual rather than shoot him, they should do that,
2 simply moving away from the individual?

3 A. Again, I think it depends on the totality of
4 the circumstances. It's not just the officers that's at
5 threat. They have to take who else is at threat. If
6 it's just the officer that's at threat, then yeah. If
7 there's an opportunity to give yourself time and
8 distance, we would encourage time and distance.

9 Q. And the training would dictate that, correct?

10 A. Correct.

11 Q. Okay. "Am I trained and equipped to handle
12 this situation myself?" That's a question that officers
13 should consider, correct?

14 A. Correct.

15 Q. And "What is the threat/risk?" Correct?

16 A. Correct.

17 Q. And part of that would be to use your eyes to
18 assess what the threat and risk is, correct?

19 A. Correct.

20 Q. Now, the next one, Bates 35, threat
21 assessment. I think that was the first factor. This
22 pertains to the first factor in the Use of Force Policy,
23 correct?

24 A. Correct.

25 Q. And it says, "Accurately assess the person,

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1 object or environmental factors that could put
2 officer/public at risk." How are officers supposed to
3 do that?

4 A. Again, taking a look at the situation that
5 they're coming on. And finding out what barriers may be
6 between them and a subject, a subject and others. What
7 kind of access do they have to weapons, to people, to
8 them. So a whole totality of things that they're
9 looking at and evaluating as they're coming on scene.

10 Q. Okay. And officers are trained that -- well,
11 strike that.

12 Is it true that officers are trained that they
13 should take steps to try to slow the incident down if
14 reasonable to do so in order to make that assessment?

15 A. If we -- yes.

16 Q. It says, "Guard against officer complacency."
17 That's underlined.

18 A. Yes.

19 Q. What does that discuss?

20 A. A lot of times we can have contact with the
21 same individual over and over. Particularly when we're
22 dealing with mental health issues. If we do -- and we
23 may have built a rapport with them at times. And we may
24 let our guard down unduly or unnecessarily, which could
25 potentially put themselves at risk and other people at

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1 Again, this is a video, and the video I don't have.
2 What is discussed?

3 A. We didn't have this video.

4 Q. Okay. All right. Now, Bates 40. This is,
5 "Step 4: Identify Options, Determine Best Course of
6 Action." Says, "Ask yourself... What am I trying to
7 achieve? What options do I have? What contingencies
8 must I consider if I choose a particular option? Do I
9 need to act now or can I wait?"

10 So it looks fairly self-explanatory. But I
11 have a question. When it refers to what options do I
12 have, does that include force options?

13 A. Correct.

14 Q. Okay. And that would include, for example,
15 Tasers, correct?

16 A. Correct.

17 Q. And officers are trained at Hayward Police
18 Department -- strike that.

19 At Hayward Police Department are all officers
20 required to carry a Taser?

21 MR. VIGILIA: I'm going to object.

22 BY MR. NISENBAUM: Q. If you know.

23 MR. VIGILIA: Outside the scope of the PMK
24 categories. His answer is his answer as an individual
25 officer, not the answer of the agency.

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1 Q. Okay. And so -- and you train officers in the
2 critical decision-making model and under that type of
3 scenario, correct?

4 A. Correct.

5 Q. Okay. Thank you. And it says here at
6 Bates 43, if the incident is not resolved after
7 executing the initial plan spin the wheel or spin the
8 model, rather, correct?

9 A. Correct.

10 Q. Meaning, meaning what?

11 A. You try to gain more information, new
12 information and assess and maybe even come up with a
13 different plan if that plan's not working.

14 Q. Now, looking at Bates 47 of the critical
15 decision-making model. Benefits of the CDM. Better
16 decisions up front. Quote, I didn't have time to think,
17 close quote. Very few situations where that is really
18 the case. What's trained there?

19 A. We talk about having a plan. And so if you
20 have a plan then your reaction to those contingencies
21 that we talked about tend to go a little smoother. And
22 whereas if you -- if you didn't have time to think, it
23 means you didn't plan appropriately.

24 Q. Right. And is it true -- does it also discuss
25 that you could do things to create more time to think?

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1 A. You could or could not?

2 Q. That you can take actions to create more time
3 to think?

4 A. You could.

5 Q. And is that trained?

6 A. It is.

7 Q. And what are you supposed to do? What type of
8 actions are you supposed to take to create more time to
9 think?

10 A. Sometimes we could -- going back to it says,
11 "Are you the right person for the job?" We may switch
12 roles from being the primary person talking, to someone
13 else. They may have a way to relate to them
14 differently. And so that would give us a little more
15 time by giving another person an option to communicate
16 with the subject.

17 Q. Going to crisis recognition. This is
18 Bates 53. The question to consider, what are the key
19 challenges police officers face when dealing with
20 persons in behavioral crisis? And this is something
21 that you present on, correct?

22 A. Correct.

23 Q. And the very next slide is recognizing a
24 person in crisis, correct?

25 A. Correct.

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1 Q. So what are officers trained to do under your
2 training in order to recognize a person in crisis?

3 A. To look at the individual's behavior is
4 usually what we're asking them to do here. We want them
5 to see what are they doing. Are they posing a threat?
6 Is there opportunities for us to have a conversation
7 with them? Is there an opportunity for them to
8 cooperate with us?

9 Q. And would a person slowly approaching officers
10 with an apparent thousand yard stare and making
11 statements along the lines of just shoot me, would that
12 be something that would indicate a behavioral crisis?

13 A. Yes.

14 Q. Okay. On Bates 57 there's a slide that says,
15 "Why should I care?" So why should officers care about
16 that?

17 A. One of the questions I ask after that is what
18 did they say when they tried to get the job as a police
19 officer. And the standard answer for most people is I
20 got into this business because or I want to be a police
21 officer because I want to contribute to society and I
22 want to help people.

23 So if you wanted to help people then why do
24 you not want to help people now. And we have a
25 conversation about what happens to police officers

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1 during Day 1 and Day 6,000.

2 Q. I've asked that question in depositions a few
3 times. And I've been very surprised at the answers I've
4 gotten. But then when I've asked was it to help people,
5 of course. And that's why they got into it. But some
6 are long down the line.

7 Crisis recognition, Bates 58. Mental illness.
8 Perception disorder, thought disorder, mood disorder,
9 PTSD. And then there's within a diamond all arrows
10 pointing to emotionally distressed person. What's
11 discussed here?

12 A. So I do preface in the beginning of these
13 slides that we are not clinicians. We are not here to
14 diagnose and to treat. And we cover that again in a few
15 slides later I believe. But we talk about how people
16 having mental illness can fall into an EDP, emotionally
17 disturbed person. And so we talk about how each of
18 these things potentially could manifest itself as a
19 person who could be disturbed that day.

20 Q. And could cause some to do things like walk
21 slowly towards officers with a razor blade in their hand
22 with a thousand yard stare saying, "just shoot me,"
23 right?

24 A. I don't necessarily use that specific
25 scenario.

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1 Q. But you understand that that would be an
2 indicator of an emotionally distressed person?

3 A. Sure.

4 Q. Okay. What is the Bates 59, the optional
5 video, if you know, Mentor for the Philadelphia Veterans
6 Court?

7 A. So this wasn't available during the 2016
8 training but became available after. And I did show
9 this at one of the follow-up trainings, I believe, in
10 2018. And this was an individual who suffered from PTSD
11 who got into a lot of trouble with the police and
12 fighting with the police.

13 And he kind of talks about his experiences and
14 how when you're contacting an individual that may be
15 going through PTSD there are some things you can be
16 sensitive to. One in particular that we cover and we
17 talk about probably the most is if you were a Marine
18 probably not a good idea to bring someone from reserve
19 Coast Guard to try to see eye to eye. Or for someone to
20 say, I know exactly what you've been through, when
21 everybody's experience over in war is different based on
22 their experiences. And so we talk about not treating
23 everybody as the same individual or using catch phrases.

24 Q. On Bates 65 under Crisis Recognition, people
25 with mental illness and the criminal justice system.

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1 A. Correct.

2 MR. NISENBAUM: All right. Do you have
3 anything, James?

4 MR. COOK: Nothing.

5 MR. NISENBAUM: Thank you.

6 THE COURT REPORTER: Would you like a
7 transcript?

8 MR. VIGILIA: Yes, please.

9 (Whereupon, at 11:17 a.m., the deposition of Mark Ormsby
10 was concluded, this date.)

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Mark Ormsby

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1 STATE OF CALIFORNIA)
2) ss.
3 COUNTY OF ALAMEDA)
4

5 I hereby certify that the witness, Mark
6 Ormsby, in the foregoing deposition appeared before
me, Kelly McKissack, a Certified Shorthand Reporter and
7 a disinterested person.

8 Said witness was then and there at the time
and place previously stated by me placed under oath to
9 tell the truth, the whole truth and nothing but the
truth in the testimony given on the date of the within
10 deposition; that the deposition is a true record of the
witness' testimony as reported by me.

11 The testimony of the witness and all questions
and remarks requested by Counsel was reported under my
12 direction and control, caused to be transcribed into
typewritten form by means of Computer-Aided
13 Transcription.

14 I am a Certified Shorthand Reporter licensed
by the State of California, and I further certify that I
15 am not interested in the outcome of the said action, nor
connected with, nor related to any of the parties in
16 said action, nor to their respective counsel. I am not
of counsel or attorney for either or any of the parties
17 to the case named in the within caption.

18 IN WITNESS WHEREOF, I have hereunto affixed my
signature this 10th day of February, 2020
19
20

21 ___/s/Kelly McKissack____

22 Kelly McKissack
23 Certified Shorthand Reporter
California License No. 13430
24
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